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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	6
Argument:	
I. The court below lacked jurisdiction of the instant case because the claim first accrued more than six years prior to the institution of the suit	9
II. General average doctrines do not apply to a public vessel of the United States	14
III. A subrogee is not entitled to recover a sum in excess of that which he has paid his subrogor	22
IV. The judgment of the court below erroneously included interest computed to be due from the United States by the general average adjusters	24
Conclusion	26
Appendix	27

CITATIONS

Cases:	
Aktieselskabet Cuzco v. *The Sucarseco*, 294 U. S. 394	15
Allianca, The, 64 Fed. 871, aff'd., 79 Fed. 989	12
Brown v. *United States*, 15 C. Cls. 392	16
Cohen Goldman & Co. v. *United States*, 77 C. Cls. 713, certiorari denied, 290 U. S. 681	13
Cramp v. *United States*, 239 U. S. 221	13
Det Forenede Dampskibs Selskab v. *Ins. Company of North America*, 31 F. (2d) 658, certiorari denied, 280 U. S. 571	10, 12
District of Columbia v. *Barnes*, 197 U. S. 146	13
Dupont de Nemours & Co. v. *Vance*, 19 How. 162	12, 19
Enrique, The, 7 Fed. 490	22
Eugenia J. Diacakis, The, 22 F. (2d) 461	12
Fairgrieve v. *Marine Insurance Co.*, 94 Fed. 686	24
Fidelity, The, 16 Blatchf. 569, 8 Fed. Cas. No. 4758	16, 19
Finn v. *United States*, 123 U. S. 227	9
Ford v. *United States*, 116 U. S. 213	9

18505—35——1

Cases—Continued.

James P. Donaldson, The, 19 Fed. 264 (aff'd., 21 Fed. 671, certified and determined, 167 U. S. 599) 17, 21
Johnson & Higgins v. *United States*, 74 C. Cls. 331, reversed, 287 U. S. 459 22
Lawrence v. *Minturn*, 17 How. 100 21
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 23
Livingstone, The, 130 Fed. 746 24
Louisville Cement Co. v. *Interstate Com. Comm.*, 246 U. S. 638 10
Nesco, The, 47 F. (2d) 643 14
Noreuro Traders, Ltd. v. *E. Hardy & Co.*, 16 Lloyd's List Law Reports, 319 12
Norwich Union Fire Ins. Soc. v. *Standard Oil Co.*, 59 Fed. 984 24
Oquendo, The, 38 Law Times 151; 3 Aspinall's Maritime Cases, 558 12
Ralli v. *Troop*, 157 U. S. 386 ..... 15, 16, 21
Rice v. *United States*, 122 U. S. 611 10
St. Johns, The, 101 Fed. 469 24
Ex parte State of New York, No. 1, 256 U. S. 490 19
Sturgess v. *Cary*, 2 Curtis 59 13
Southern Pacific Co. v. *United States*, 67 C. Cls. 414 10
Tillson v. *United States*, 100 U. S. 43 25
United States v. *Wardwell*, 172 U. S. 48 9
United States v. *Wilder*, Fed. Cas. 16694 16
Western Maid, The, 257 U. S. 419 ..... 18, 19

Statutes:

Judicial Code, as amended:
Sec. 156 (28 U. S. C., sec. 262) 2
Sec. 177 (28 U. S. C., sec. 284) 3, 25
U. S. C., Title 28, sec. 250 13
U. S. C., Title 31, secs. 218–221 20
U. S. C., Title 36, sec. 11 18

Miscellaneous:

Am. & Eng. Enc. of Law (2d Ed.), Vol. 14, p. 999 13
Am. & Eng. Enc. of Law (2d Ed.), Vol. 14, p. 997 22
Barclay on General Average, p. 6 14
Congdon on General Averages (2d Ed.), p. 165 26
Francesco Berlingieri, The York-Antwerp Rules, p. 105 26
Hopkins, *General Average*, p. 55 20
1 Story's Eq. Jur. (13 Ed.), sec. 491 13
1 Magens on Insurance, p. 63 15

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OPINION BELOW

The opinion of the Court of Claims (R. 12–20) is reported in 1934 A. M. C. 1563.

JURISDICTION

The judgment of the Court of Claims was entered November 5, 1934 (R. 20). Motion for a new trial was overruled January 14, 1935 (R. 20). A petition for a writ of certiorari was filed April 12, 1935 (R. 20), and was granted May 20, 1935. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a suit against the United States for contribution in general average, the cause of action first accrues upon the delivery of the cargo at its destination or upon the conclusion of the statement prepared by general average adjusters.

2. Whether general average doctrines apply to the operation of an Army transport carrying military supplies and personnel, and cargoes belonging to the American Red Cross, the Government of the Philippine Islands and its national railway, so as to obligate the United States to contribute in general average.

3. Whether an underwriter, who has paid the Philippine Government and its national railway for physical damage caused to their cargo, may recover more than the amount paid to its assured.

4. Whether, in computing the general average contribution of the United States, interest should be added to the amount which the other parties are to receive.

STATUTES INVOLVED

Section 156 of the Judicial Code, as amended (28 U. S. C., Sec. 262):

> Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues. * * *

Section 177 of the Judicial Code, as amended (28 U. S. C., Sec. 284):

> No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *.

STATEMENT

The findings of fact by the Court of Claims may be summarized as follows (R. 7–12):

The Army transport *Logan,* which was used primarily in the carrying of military supplies and personnel with authorized allowances of baggage, sailed on December 5, 1918, for Vladivostok, Siberia, and the Philippine Islands (R. 8). In addition to military supplies, personnel, and baggage, the *Logan* on this voyage carried Red Cross supplies and certain property of the Government of the Philippine Islands and of the Manila Railroad Company, all of whose capital stock is owned by the Philippine Islands Government (R. 7, 8). This property was carried subject to a notice posted on the bulletin board in the Quartermaster's Station at the dock in San Francisco, stating that the United States would use due care in handling goods shipped on the transport, but would not be responsible for them (R. 8). The supplies and cargo were carried free of charge, and no bills of lading were issued (R. 8).

During the voyage fire was discovered in one of the holds and in extinguishing it a substantial portion of the cargo was damaged by water and steam, and some of it was thrown overboard (R. 9). The fire, as was later found, was caused by spontaneous combustion, and was due to the negligence of no one (R. 9). On January 4, 1919, the *Logan* arrived at Vladivostok and discharged part of the cargo (R. 9). On January 19, 1919, the *Logan* arrived at Manila, and there discharged the remainder of the cargo (R. 9). The master of the transport delivered the cargo without obtaining from the owners and consignees general average bonds (R. 9). In April 1921 the Atlantic Mutual Insurance Company, the respondent herein, which had insured the cargoes of the Government of the Philippine Islands and its national railway, completed payment to its assured in the sum of $38,997.02, which amount constituted payment in full of all losses claimed by the assured under the policies (R. 9–10). On March 15, 1921, the insurance company made claim upon the War Department for general average contribution (R. 10). A board of inquiry in the War Department denied this claim, but subsequently the Judge Advocate General reversed the decision and held that general average was properly payable (R. 10).

On August 22, 1922, Johnson & Higgins, average adjusters, were employed by the War Department

to prepare a general average statement, which was completed and issued on December 31, 1926 (R. 10–11). This statement showed that the Government of the Philippine Islands and its railway were to contribute $8,909.08, and to receive $38,132.76, plus interest on the same in the amount of $18,-875.72, leaving a balance to be received of $48,099.40 (R. 10–11; pp. 52–57 of statement of the general average adjuster[1]). On or about May 28, 1928, the General Accounting Office notified the respondent that its claim for payment of general average had been rejected (R. 11). On or about December 10, 1928, the Comptroller General, on review, notified the respondent that the disallowance of its claim had been sustained (R. 11). On February 18, 1929, the insurance company brought the present action in the Court of Claims (R. 1). The United States moved to dismiss on the ground that the action was brought more than six years from the date when the cause of action first accrued (R. 6). The Court of Claims overruled that motion, and on the merits held that the respondent was entitled to recover from the United States the sum of $48,-099.40 (R. 20).

[1] This general-average statement is by reference made a part of finding No. 14 (R. 11). The full statement was not printed in the record, but certain relevant portions of it were quoted. Pages 52–57 of the statement, however, were not quoted, and they are therefore printed in the appendix to this brief. The full statement is on file in the office of the Clerk of this Court.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to dismiss the petition upon limitation grounds.

2. In holding that general average principles apply to voyages of Army transports "used primarily for the carrying of Government supplies and the United States Army personnel, and their authorized allowances of baggage."

3. In holding that the underwriter could recover in excess of the amount paid its assured.

4. In allowing, as a proper item of consideration in the adjustment, interest on the sums to be received.

SUMMARY OF ARGUMENT

I

Section 156 of the Judicial Code, as amended, precludes the Court of Claims from entertaining a suit filed more than six years after a claim first accrues. In the instant case the *Logan* arrived at its port of destination in January 1919, the general average statement was issued in December 1926, and the suit was filed in February 1929.

The court below held that the general-average statement was in the nature of an account stated, and that the statute did not commence to run until the issuance of such statement.

A claim first accrues from the time suit may first be brought thereon. A suit for a general-average contribution may be brought from the time the ves-

sel arrives at its port of destination. A general-average statement is not a condition precedent to the institution of a suit. A claimant against the United States has six years from the time a cause of action arises within which to seek settlement of his claim, but he must file suit before the expiration of the six-year period. A general-average statement is not an account stated. The statute of limitations had run at the time the general-average statement was issued. Officers of the Government have no authority to issue an account stated, and revive an action which is barred. The Court of Claims, therefore, in this case, had no jurisdiction to entertain the suit.

II

The United States is not liable for contribution in general average insofar as public vessels are concerned. The case of *Johnson & Higgins* v. *United States,* 287 U. S. 459, expressly left this question open. The absence of any authority holding that military or other public vessels are subject to general average rules would deny that they were. An Army transport is part of the sovereignty to which she belongs and her liability is merged in that of her sovereign. Characteristic principles and rules of maritime law cannot impose themselves upon and override the privileges and prerogatives which belong to the sovereign. Equitable principles would deny the application of the rule of gen-

eral average to this case. In order that there exist liability in general average the voyage must constitute a common adventure. The voyage here in question was part of a military operation and should not be classed as a common maritime venture.

III

The respondent is in court under the theory of subrogation. The contracts of insurance were contracts of indemnity. Under the doctrine of subrogation a subrogee is entitled only to reimbursement of the amount actually paid by him. It was, therefore, error on the part of the Court of Claims to render judgment in excess of the amount actually paid by the respondent.

IV

The rule that the United States is not liable for interest, except where it assumes such liability by contract, by express words of a statute, or where it must pay it as part of just compensation required by the Constitution, is too well settled to admit of doubt. The judgment of the court below includes the sum of $18,875.72, which represents interest for which the United States has not assumed liability, and accordingly, its inclusion in the judgment was error on the part of the court below.

ARGUMENT

I

THE COURT BELOW LACKED JURISDICTION OF THE INSTANT CASE BECAUSE THE CLAIM FIRST ACCRUED MORE THAN SIX YEARS PRIOR TO THE INSTITUTION OF THE SUIT

Section 156 of the Judicial Code, as amended, *supra,* p. 2, provides that every claim against the United States cognizable by the Court of Claims shall be forever barred, unless a petition setting forth such claim is filed in the court within six years after the claim first accrues. This statute is not only one of limitation, but it is also a jurisdictional statute, the Court of Claims being without jurisdiction to entertain any suit filed more than six years after the claim first accrues. *Ford* v. *United States,* 116 U. S. 213, 217; *Finn* v. *United States,* 123 U. S. 227, 232–233; *United States* v. *Wardwell,* 172 U. S. 48, 52.

In the instant case, the loss occurred in December 1918, and the *Logan* arrived at Manila, its port of destination, on January 19, 1919. The respondent, after having satisfied the claim of the insured, filed on March 15, 1921, a claim with the War Department for a general-average contribution. The War Department referred the matter to Johnson & Higgins, a firm of general-average adjusters, who, on December 31, 1926, issued the general-average statement. The suit in question was filed in the Court of Claims on February 18, 1929.

In the court below the Government urged that the claim should be dismissed because the cause of action accrued during January 1919, when the *Logan* arrived at destination and delivered her cargo, and the petition was not filed until ten years later. The court, however, held that although a libel *in rem* could have been filed by the cargo owners against the ship (if privately owned) upon arrival at destination, a different rule applied *in personam*. It considered the general average statement prepared by the adjusters to be in the nature of an account stated and that the right of action accrued at the time of its submission.

A claim first accrues at the time suit first may be brought. (*Rice* v. *United States,* 122 U. S. 611, 617; *Louisville Cement Co.* v. *Interstate Commerce Commission Co.,* 246 U. S. 638, 644; *Southern Pacific Company* v. *United States,* 67 C. Cls. 414, 422.)

We respectfully submit the sound rule is stated in *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America,* 31 F. (2d) 658 (C. C. A. 2d), certiorari denied, 280 U. S. 571, where it was held that a suit for general average contribution, in the absence of the claim being rested on a general average bond containing conditions to the contrary, may first be brought at the termination of the voyage and with the delivery of the cargo. Judge Learned Hand, speaking for the court, said (pp. 659–660):

> We hold that suit may be brought upon the implied obligation at the termination of

> the venture and acceptance of the goods, and that the amount may be liquidated in the action or suit. The law is familiar enough in actions of tort and in many actions in contract, with liabilities which are presently due, although unliquidated. With the consistency of the motion we are not concerned; it is enough that the obligor is treated as though presently liable. An average bond may, of course, change this, and make the settlement a condition precedent upon the right of action. Such was apparently the case in *Wavetree S. S. Co.* v. *Love* (1897), L. R. App. Cas. 373, though even then it was held that the shipowner might state the adjustment himself. Nor, indeed, was it decided even in the case of such a bond that no action could be brought as upon an unliquidated claim. However that may be, the record does not advise us of the language used in this bond; we are to take it as a substitute for the consignee's implied obligation. We need only say that, unless the contrary appears, the obligation becomes unconditionally due upon acceptance of the goods.

The court below did not consider that case "as either controlling or actually bearing on the question" of limitation, and the ruling, at most, "merely *obiter*" (R. 15). We cannot agree with this. While the rate of exchange to be applied to general average contribution was the question involved there, that question depended upon the due

date of the contribution, and the court held that that date was when the ship arrived at the port of destination, at which time the cause of action first accrued and the right to bring suit arose, rather than later when the adjustment was concluded. This ruling is in conformity with the English decisions. *Noreuro Traders, Ltd.* v. *E. Hardy & Co.*, 16 Lloyds List Law Reports 319, and *The Oquendo*, 38 Law Times 151; 3 *Aspinall's Maritime Cases*, 558.

The Allianca, 64 Fed. 871 (affirmed, 79 Fed. 989), an earlier case in the same circuit holding to the contrary, upon which the court below rested its decision, was expressly overruled in the *Det Forende* case, *supra*, upon the authority of *Dupont de Nemours & Co.* v. *Vance*, 19 How. 162. This Court in the latter case treated a libel *in rem* for non-delivery of cargo as a general average action, and remanded the case to state the adjustment. See *The Eugenia J. Diacakis*, 22 F. (2d) 461. The opinion of the court below (R. 14) recognizes the soundness of this rule as applied to proceedings by cargo owners against the ship, but concluded a different rule was to be applied where the proceedings were against the owner. We see no soundness in such a distinction.

It seems that courts of equity also have jurisdiction of general-average causes from the very nature of the subject, the obligations being imposed by law on the principles of equity and justice. In such

proceedings a court of equity has authority to bring all the parties before it and refer the whole matter to a master to state the apportionment or adjustment. 1 Story's Eq. Jur. (13 Ed.), sec. 491; *Sturgess* v. *Cary*, 2 Curtis 59; Am. & Eng. Enc. of Law (2d Ed.), Vol. 14, p. 999. The Court of Claims is given jurisdiction over claims upon a contract express or implied "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." U. S. C., Title 28, sec. 250. The respondent could have sought such relief in the Court of Claims upon the delivery of the cargo. Cf. *District of Columbia* v. *Barnes*, 197 U. S. 146; *Cramp* v. *United States*, 239 U. S. 221. Although the cargo was delivered January 1919 the underwriter here did not file its suit in the court below until February 18, 1929 (R. 1).

The law applying to limitation of actions, we think, is correctly stated by the court below in *Cohen Goldman & Co.* v. *United States*, 77 C. Cl. 713, 730 (certiorari denied, 290 U. S. 681), where it was held that the statute gave the claimant six years within which to obtain a settlement of its claim in the Departments, but made it necessary that if such settlement should not be effected within that time suit must be instituted within the six-year period. The theory of an account stated which the court below considered is unsound, and ought not

to limit the application of the statute. A general-average statement is not an account stated, but merely the statement of an account. *The Nesco,* 47 F. (2d) 643 (S. D. N. Y.). Furthermore, we submit, there is no authority existing in an executive officer of the Government to issue an account stated after the statute of limitations has barred a cause of action, and thereby revive that cause of action which Congress has expressly stated shall be barred. Still less can we conceive of a general average adjuster, who is in no sense an officer of the Government, issuing an account stated which would revive an action after it has been barred by the statute of limitations.

The petition should be dismissed upon limitation grounds.

II

GENERAL-AVERAGE DOCTRINES DO NOT APPLY TO A PUBLIC VESSEL OF THE UNITED STATES

As applied to commercial ships and cargoes, the principles of general average which the opinion announces are sound. To consider these historically can serve no substantial purpose. All agree that the doctrine of general average contribution was derived from the laws of the Rhodians (about 900 B. C.), then adopted into the Roman law and forms a part of the Digest of Justinian. It has been carried into all the maritime codes, and now is accepted by all nations. Barclay on *General Average,* p. 6; *Ralli* v. *Troop,* 157 U. S. 386.

Broadly speaking, the rule is when a common maritime venture is confronted with a common imminent peril and a voluntary sacrifice or extraordinary expense is made or incurred and there is a resulting benefit to all interests, all shall contribute to indemnify for the loss of the property which is sacrificed by one in order that the whole adventure may be saved. *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394, 401; *Ralli* v. *Troop, supra,* 395–396.

Throughout its entire history it has applied to vessels operated commercially. An exhaustive search of the authorities has been made, and we are unable to find any instances where it has been applied to the voyages of vessels owned by any nation and employed in its public service—operations of Government—save the statement in Magens on Insurance (1755), p. 63:

> There is a Difference nevertheless when these rich Wares come by King's Ships, or Packet Boats, as such Vessels never pay nor receive any Average; see *Case,* 10 E. The Reason is, in Goods belonging to his Majesty all his Subjects in general are concerned, wherefore for any particular Loss of them no particular Contribution is necessary, because it is supplied by the general Contribution of the whole Community.

There are cases where general average contribution has been assessed against government-owned property carried aboard commercial vessels,

United States v. *Wilder,* Fed. Cas. No. 16694; *Brown* v. *United States,* 15 C. Cls. 392, but no question of public use was involved there. The distinction between public use and government ownership is pointed out in *The Fidelity,* 16 Blatchf. 569, 8 Fed. Cas. No. 4758, where the court said:

> No question of public use was involved. There was nothing to take it out of the general rules of the maritime law, except public ownership, and that, all will concede, is not enough. Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use, and must be employed in carrying on the operations of the government. There may be some expressions of the learned justices who wrote the opinions in these cases [Siren—the Davis] which, if separated from the facts then under consideration, would indicate that the lien extended to public vessels employed in the public service, as well as to others; but that question was not up for determination, and it is proper, therefore, to confine the actual decision to the cases as they stand.

The absence of any direct authority holding that military or other public vessels are subject to general average rules would deny that they were. This Court, in *Ralli* v. *Troop, supra,* 414–415, said:

> Considering how ancient and universal is the law of general average, how frequent the occasions for invoking it under every variety

> of circumstances, and how diverse the opinions which have been expressed in regard to its application and extent, it is significant that the learned arguments of counsel, supplemented by further researches, have disclosed no commercial code, no opinion of a commentator, and no judicial decision, supporting a claim to contribution in general average for the destruction of ship or cargo by the municipal authorities of a port, without the direction of the master or other commanding officer of the ship. That being so, it is difficult to see how the parties to a maritime adventure can be considered either to have contracted to contribute to such a loss, or to be subjected by the law, without their consent, to the duty of so contributing.

In that case the services of a fire department, acting only under command of municipal officers, were by authority of municipal law. Judge Addison Brown, in *The James P. Donaldson,* 19 Fed. 264, 269 (aff. 21 F. 671, certified and determined, 167 U. S. 599), applied like reasoning to a tug and tow situation:

> I know of no case in which it has even been discussed. Indeed, the very fact that no claim of this description has ever been made is worthy of suggestion as indicating the view generally taken by the profession. It is true there are in this case many of the elements which go to entitle the barges to a general average contribution, as stated in the leading case of *Bernard* v. *Adams,* 10 How.

> 270; still I know of no case wherein the principle of mutual contribution has been extended beyond the ship, her boats, tackle, apparel, furniture, and cargo. I understand the law of general average to be an outgrowth of the law-maritime as applied to the carriage of goods by sea. * * *

The respondent (underwriter) issued its policy of insurance against marine perils, including loss by fire, covering the carriage by the transport *Logan* (R. 8, 9), and is to be charged with knowledge of the vessel's public status. The general average claim was not presented until two years after the cargo was delivered (R. 10).

The question here presented is whether these accepted principles of general average heretofore applied solely to vessels employed in commercial service, are applicable and overrule the prerogatives of sovereignty which, we submit, here furnish the proper rule. The Government admittedly had committed the Army transport to carry on its military operations during a war period and the venture is to be considered a governmental (military) one only. The Red Cross supplies carried were in aid of war stricken areas, and have a distinctly public status. In *The Western Maid,* 257 U. S. 419, this Court so considered food supplies intended for the war stricken European countries. Transportation of such supplies at the cost of the Government is provided by statute (U. S. C., Title 36, sec. 11). No lien rights of contribution could

be asserted against such cargoes. The property of the Philippine Government and its nationally owned railroad should be so classed. These are supplies purchased by the Bureau of Insular Affairs of the War Department who handle such purchases for our possessions, and the carriage of these supplies cannot limit the military status of the transport.

The question is not a procedural one, as the court below has considered it. The characteristic principles and rules of the maritime law cannot impose themselves upon and override the privileges and prerogatives which belong to the sovereign. *Ex parte State of New York, No. 1,* 256 U. S. 490, 502–503; *The Western Maid, supra,* at p. 432. An Army transport is part of the sovereignty to which she belongs and her liability is merged in that of her sovereign. *The Western Maid, supra; The Fidelity, supra.* No lien liability for average contribution can arise or attach.

In sharp contrast the status of commercial vessels and their cargoes is readily defined. Their primary employment is in trade or commerce, and lien liability (*in rem* proceedings) for average contribution may be asserted against the vessel. *Dupont de Nemours & Co.* v. *Vance, supra,* pp. 168–171. Personal liability of the owner usually is rested upon the consideration that the ship is responsible to make such contribution.

See the most serious situations the rulings of the court below create. A government transport com-

missioned on military service during a war period, carrying military supplies and personnel, because it consents to carry Red Cross supplies intended for relief in war-stricken countries (public property) and supplies for the Philippine Government and its national railroad, both public institutions, now is held subject to general average principles. The master of the Army transport is required to secure average bonds or deposits, upon the theory that such property is subject to a lien for its contribution. No lien liability could be imposed against such property having such public status. The regulations for the Army Transport Service, which in detail outline the duties of the master, contained no such provisions. The general average statement awards contributions to army officers, although their property was aboard upon the command of superiors and in compliance with military requirements, with the law providing reimbursement to them for their losses (U. S. C., Title 31, Secs. 218–221). If general average rests upon equity, as is an accepted theory, equitable principles would deny its application here.

Even in commercial undertakings, general average doctrines have not been applied in every instance where a vessel goes to sea with cargo aboard and a sacrifice in the nature of general average takes place. For example, the rule is stated by Hopkins on General Average (p. 55), to be that if a merchant ship be captured by a public enemy, it is not allowed, "*for national considerations,*" to ransom

her, and consequently a sum of money paid for the ransom of the whole co-adventure could not be recovered from the several interests in general average. However, the same considerations do not apply where the ship is captured by a pirate or private marauder and money is given to the captor through compulsion to effect the release of the vessel and her cargo, and contribution from the other interests may be had. In the *James P. Donaldson* case, *supra,* a tug, in imminent peril of being blown ashore and lost, was saved by casting off and abandoning her tow of barges which were thereafter driven ashore and wrecked. There, one interest was sacrificed for another with which it was closely associated on a sea voyage, but this Court, considering the relation between tug and tow, held that the tug was not liable in general average. In *Lawrence* v. *Minturn,* 17 How. 100, this Court denied a claim in general average against a vessel which had jettisoned her deck cargo. In *Ralli* v. *Troop, supra,* this Court held that the scuttling of a ship by port municipal authorities, acting without the direction of her master or other commanding officer, to extinguish a fire in her hold, was not a general average loss. It was there pointed out that the sole office and paramount duty of the municipal authorities were to protect and preserve all the shipping and property in the port for the benefit of the public and not to benefit private individuals engaged in the venture, and in the execution of this office and in the performance of this duty the municipal

authorities there acted under their official responsibility to the public and not under the direction of the master of the vessel. It is competent for the parties to make any contract they wish which may enlarge, limit, or exempt their liabilities in general average contribution. *Am. & Eng. Enc. of Law* (2d ed.), Vol. 14, p. 997; *The Enrique,* 7 Fed. 490.

The public status here of the parties concerned and the property involved upon like considerations is the factor which makes inapplicable general-average principles.

The operation of military transports is by the paramount authority of Government in the performance of its public obligation. The incidental carriage of cargo for its public institutions and territorial possessions, without pay and subject to notice that it would not be responsible therefor, ought not to qualify such operation. If it be a military operation, we submit the voyage should not be classed as a common maritime venture, which is the basis upon which general average must be rested. The court below reached that conclusion in *Johnson & Higgins* v. *United States,* 74 C. Cls. 331 (reversed on other grounds, 287 U. S. 459).

III

A SUBROGEE IS NOT ENTITLED TO RECOVER A SUM IN EXCESS OF THAT WHICH HE HAS PAID HIS SUBROGOR

Although the underwriter, who here brought the suit, paid its assured, the Philippine Government and its national railway, only $38,996.22, the total

claimed by the assured for damage to their cargo, the court below gave judgment for $48,099.40, the amount of the contributions (including interest) which the adjusters held the assured entitled to receive. These totals include amounts to be contributed by the Red Cross and the Government.

We have difficulty in understanding the ruling of the court below (R. 19). Apparently it rested upon the view that as the master failed to secure average bonds or other security from the Red Cross and the Philippine Government, the United States was responsible for the full amount of contribution as shown in the statement. Irrespective of the questions whether such security could have been required of the Red Cross or whether interest is an item recoverable, the law does deny recovery to an underwriter in any action which it has instituted in its own name, of any sum in excess of that which it has paid to its assured. Subrogation gives indemnity only and cannot take place beyond the amount the underwriter actually has paid. The question of the amount which the assured could have recovered, if they had brought the suit, is not here present.

The applicable rule has been stated by this Court in *Liverpool Steam Company* v. *Phenix Insurance Company*, 129 U. S. 397, 462:

> From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the

> goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the shipper.

It consistently has been applied in all the later cases. *Fairgrieve* v. *Marine Ins. Co.,* 94 Fed. 686, 688 (C. C. A. 8th); *The St. Johns,* 101 Fed. 469, 474, 475 (S. D. N. Y.); *Norwich Union Fire Insurance Soc.* v. *Standard Oil Co.,* 59 Fed. 984, 987 (C. C. A. 8th); *The Livingstone,* 130 Fed. 746, 749 (C. C. A. 2d). The opinion of the court below (R. 19, 20) does not consider the application of this principle.

To us there can be no doubt but that the underwriter's recovery, if it be entitled to any, must be limited to the amount it has paid its assured.

IV

THE JUDGMENT OF THE COURT BELOW ERRONEOUSLY INCLUDED INTEREST COMPUTED TO BE DUE FROM THE UNITED STATES BY THE GENERAL-AVERAGE ADJUSTERS

The judgment of the court below included interest computed to be due in the general average statement. The statement, which is made a part of the record by reference (R. 11), shows at pp. 52–53 thereof, *infra,* p. 27, that the Government of the Philippines and its national railroad were to con-

tribute $8,909.08 and were to receive $38,132.76 as allowances and an additional $18,875.72 characterized as "interest on same", making a total balance to be received of $48,099.40. Without interest, the balance would be $29,223.68.

The statute under which the Court of Claims is organized expressly declares that "no interest shall be allowed on any claim up to the time of rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." (U. S. C., Title 28, sec. 284, *supra*, p. 3.) In *Tillson* v. *United States*, 100 U. S. 43, this Court summarized the application of this statute:

> Interest, however, would have been recoverable as against a citizen, if the payments were unreasonably delayed. But with the government the rule is different for, in addition to the practice which has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for, the statute under which the Court of Claims is organized expressly declares "that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon in the Court of Claims, unless upon a contract expressly stipulating for interest." Rev. Stat. 1091. This is conclusive. No interest was stipulated for in this contract, and the prohibition against its allowance has not been removed in favor of the claimants.

In the average statement, the allowance of the $18,875.72 is designated as "interest on" amount to

be received. Such allowances are characterized as interest in the text books and by the accepted rules of average adjusters. Francesco Berlingieri on The York-Antwerp Rules, p. 105; Congdon on General Averages (2d ed.), p. 165.

The United States here has not assumed the liability to pay interest by contract or by statute. It is an ordinary situation. It would seem to follow that the allowance of $18,875.72, being an item of interest, was erroneous and the judgment, in any view, ought not to exceed $29,223.68.

CONCLUSION

We respectfully submit that the judgment of the Court of Claims should be reversed and the case remanded with instructions to dismiss the petition. If, however, the question of interest or the amount to be contributed needs to be determined, then remanding with instructions for further proceedings would appear proper.

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APPENDIX

Excerpts from statement of general average (pages 52–57)

Apportionment of general average on cargo and settlement	Contributory value including amount made good	Pays proportion of general average	Receives—		Balance to—	
			Allowances	Interest on same	Pay	Receive
Shipped by various departments of the War Department: Miscellaneous cargo, as per ship's manifest	$669,068	$669,068	$31,289.68	$7,570.48	$3,747.39	$19,971.81
Shipped by the American Red Cross: Miscellaneous cargo, as per ships manifest	260,331	260,331	12,174.66			12,174.66
Shipped to the Philippine Islands Government and the Manila Railroad Company: Miscellaneous cargo, as per ship's manifest	190,503	190,503	8,909.08	38,132.76	18,875.72	$48,099.40
Shipped by Colonel S. E. Allen, Coast Artillery Corps: Personal property, as per ship's manifest	1,851	1,851	86.56	1,013.92	501.89	1,429.25
Shipped by Knute A. Johnston, warrant officer, Coast Artillery Corps: Personal property, as per affidavit	445	445	20.81	445.20	220.37	644.76
	1,122,198	52,480.79	47,162.36	23,345.37		
Owners of vessel: Pay vessel's proportion of general average			*Dr.* 22,213.88		22,213.88	
Average adjusters: Receive their fee and disbursements				*Cr.* 2,365.12		2,365.12
Settling agents: Receive commission for collecting and settling the general average				1,821.82		1,821.82
					54,360.35	54,360.35

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